



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dakota Tribal Industries, Inc.--Reconsideration
File: B-227939.2
Date: December 17, 1987

DIGEST

Prior decision that protester was not prejudiced by procuring agency's failure to promptly forward size appeal to Small Business Administration (SBA) is affirmed on reconsideration. Fact that SBA regional office denial of contracting officer's size protest was reversed on appeal does not alter prior result because size protest decision was prospective only.

DECISION

Dakota Tribal Industries, Inc. (DTI), requests reconsideration of our decision in Dakota Tribal Industries, Inc., B-227939, Oct. 5, 1987, 87-2 C.P.D. ¶ 334. In that decision, we denied DTI's protest that the firm was prejudiced by the Army's failure to promptly forward to the Small Business Administration (SBA) DTI's size protest that a competing firm, Brownell and Co., Inc., did not qualify as a small business eligible for award under solicitation No. DAAK01-87-B-A212, a small business set-aside issued by the Army.

In its size protest, DTI had alleged that Brownell was affiliated with Bridgeport-Grundy, Ltd., a large business, and that the restructuring arrangement between these two firms was "ineffective to negate control of Brownell by Bridgeport-Grundy" under SBA voting trust regulations. See 13 C.F.R. § 121.3(a)(v) (1987).

We found that the Army's failure to promptly forward DTI's size status protest to the SBA did not prejudice DTI because the firm's size status protest was untimely. DTI's protest was not filed with the Army by the close of business of the fifth day after bid opening as required under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.302(d)(1) (1986) and SBA regulations at 13 C.F.R. § 121.9. Therefore,

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any ruling by SBA on DTI's size protest would have been prospective only and not have affected the outcome of the subject procurement. 48 C.F.R. § 19.302(a) and 13 C.F.R. § 121.9; T.S. Head and Associates, Inc., B-220316, Sept. 30, 1985, 85-2 C.P.D. ¶ 308.

Further, since the Army filed its own size protest with the SBA (which is always considered timely even if filed after the 5-day period), SBA, in fact, considered the small business size status of Brownell. Since SBA found that Brownell qualified as a small business concern eligible for award under the subject procurement, we concluded that DTI was not harmed by the Army's failure to forward to the SBA regional office the firm's untimely size protest.

On reconsideration, DTI points out that on appeal the SBA Office of Hearings and Appeals (OHA) reversed the SBA's regional office decision. OHA found that "Because Brownell is affiliated with and owned by an other-than-small firm, it is, itself, other than small." Based on this finding, DTI argues that our denial of its protest was improper. DTI alleges that because OHA found Brownell not to be a small business concern and "agreed completely with DTI's that the position voting trust regulation unequivocally requires that Brownell be considered a large business," DTI was prejudiced by the SBA regional office's failure to consider DTI's original size status protest. DTI alleges that had the Army promptly forwarded the firm's size protest to the SBA regional office, that office would have considered its protest, and like OHA, agreed with DTI that Brownell is a large business concern.

The fact that OHA reversed the SBA regional office on appeal does not alter our holding in our prior decision. As we explained in our prior decision, DTI's size protest alleging Brownell to be affiliated with a large business was untimely filed and, therefore, any ruling by the SBA regional office would have been prospective only and not affected the outcome of the procurement. 48 C.F.R. § 19.302(d) and 13 C.F.R. § 121.9.

Further, as we also explained, in its size determination of Brownell, the SBA regional office considered the alleged affiliation between Brownell and Bridgeport-Grundy and, in doing so, reviewed documents restructuring the voting rights between those firms which DTI had alleged violated SBA voting trust regulations. However, the SBA regional office did not find that the restructuring agreement violated SBA regulations. Thus, since the SBA regional office in fact considered the allegation raised in DTI's size protest, we find no merit to DTI's contention that had the Army promptly forwarded the firm's untimely size protest to the SBA

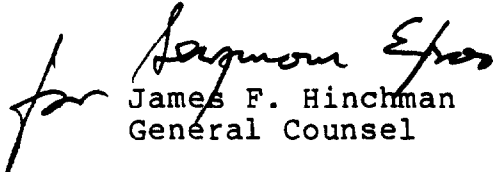
regional office, that office, like OHA, would have found that Brownell did not qualify as a small business.

DTI also states that OHA found that DTI filed a timely appeal of the SBA regional office's decision for "the purpose of the subject procurement." The firm thus argues that its underlying size protest filed with the Army also must be considered timely for the purpose of this procurement.

As we explained in our prior decision, in order to affect a particular solicitation or procurement, a size protest must be filed with the contracting activity within the time limits set forth in 48 C.F.R. § 19.302(d) and 13 C.F.R. § 121.9. Since DTI did not comply with the timeliness requirements set forth in these provisions, any ruling on that protest would have been prospective only. T.S. Head & Associates, Inc., *supra*. Furthermore, OHA did not find that DTI's May 20 size protest was timely. Rather, OHA found that DTI had timely filed an appeal from the regional office's decision on the contracting officer's protest.

Subsequent to the SBA regional office determination and prior to DTI's appeal to OHA, the agency awarded a contract to Brownell. We note that the determination of OHA that Brownell is large does not affect the award of a contract if it is received by the contracting officer after the award. FAR, 48 C.F.R. § 19.302(i); William Enterprises, Inc., B-224669, Sept. 24, 1986, 86-2 C.P.D. ¶ 347.

Since the protester has not shown any error in fact or law, we affirm our prior decision.


James F. Hinchman
General Counsel